



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF,
TOWN HOUSE DEPARTMENT STORES,
INC., dba ISLAND BUSINESS SYSTEMS &
SUPPLIES,

Appellant.

APPEAL NO: OPA-PA-08-011

FINDING AND RECOMMENDATIONS
OF HEARING OFFICER

I. INTRODUCTION

This is the Finding of the Hearing Officer, ANTHONY R. CAMACHO, ESQ. on an appeal filed on July 24, 2008, by TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, (Hereafter "IBSS") regarding the GUAM PUBLIC SCHOOL SYSTEMS' (Hereafter "GPSS") receipt of copier equipment and related services from XEROX CORPORATION (Hereafter "XEROX"). This appeal is based on IBSS's December 4, 2007 protest. This is the second time this matter has come before the Public Auditor. IBSS submitted the original appeal on February 7, 2008, which was filed as OPA-PA-08-003. On July 11, 2008, the Public Auditor determined that she did not have the jurisdiction to hear the appeal in OPA-PA-08-003 because GPSS had not rendered a decision on IBSS' protest. Subsequently, GPSS issued their decision denying IBSS' protest and IBSS filed their second appeal. The Hearing Officer recommends that the Public Auditor hold that IBSS' December 4, 2007, protest was timely and the Hearing Officer recommends that the Public Auditor sustain IBSS' appeal because the GPSS contract with XEROX was improperly sole sourced and improperly extended to December 31, 2009.

II. FINDINGS OF FACT

These findings are based on the Procurement Record and all documents submitted by the parties in the appeal because no party to this proceeding has requested a hearing.

1 All matters submitted in OPA-PA-08-003 should be considered here. IBSS requests the
2 Public Auditor take judicial notice of all matters submitted in OPA-PA-08-003 and GPSS did not
3 oppose this request. Generally, in reaching a decision on a procurement appeal, the Public
4 Auditor may take official notice of any fact that may be judicially noticed by the courts of Guam.
5 2 G.A.R., Div. 4, Chap. 12, §12108(h). Judicial notice for Guam courts is also called knowledge
6 of the court. 6 G.C.A. §2106. Guam courts may take judicial notice of facts that are not subject
7 to reasonable dispute because such facts are either generally known within the jurisdiction of the
8 court or capable of accurate and ready determination by resort to resources whose accuracy
9 cannot reasonably be questioned. Rule 201(b), Guam Rules of Evidence. The Hearing Officer
10 recommends that the Public Auditor find that she can take official notice of all matters submitted
11 in OPA-PA-08-003. The record in OPA-PA-08-003 is part of the knowledge of the Public
12 Auditor for this matter, the record in OPA-PA-08-003 is not subject to reasonable dispute or
13 question by the parties. Thus, IBSS' request is hereby granted and the Public Auditor takes
14 official notice of all matters in OPA-PA-08-003. Based on the record in this matter and in OPA-
15 PA-08-003, the Hearing Officer recommends that the Public Auditor make the following
16 findings of fact:
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20 1. On December 18, 2000, GPSS¹, executed Document Services Agreement No.
21 7002364 (Hereafter "DSA") with XEROX. The DSA required, in relevant part, XEROX to
22 provide document production services, copying equipment, and software to GPSS in exchange
23 for GPSS' minimum monthly payment of \$128,365, for the period January 1, 2001 to December
24 31, 2005. There is no record of GPSS soliciting the document production services and
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28 ¹ The Public Auditor shall use the term "GPSS" to describe the purchasing agency in this matter. GPSS was known
as the "Department of Education" or "DOE" prior to June 6, 2005. On that date, P.L. 28-045:10 became effective
and changed the Department of Education or DOE to GPSS.

1 equipment required by the DSA, and there is no record of the XEROX being awarded the DSA
2 as the result of such a solicitation.²

3 2. On or about April 17, 2001, GPSS and XEROX executed Amendment No. 1 to the
4 DSA which, in relevant part, added additional equipment to the DSA and extended the DSA's
5 term to April 1, 2001 to March 31, 2006 for the additional equipment.³

6 3. On December 16, 2004, GPSS and XEROX entered into Amendment No. 17 to the
7 DSA which, in relevant part, extended the entire agreement from January 1, 2005 to December
8 31, 2009.⁴

9 4. In 2005, IBSS began marketing their copier products and services to GPSS. At that
10 time, IBSS understood that GPSS had a long-standing relationship with a competitive vendor.⁵

11 5. On July 12, 2005, Juan P. Flores, GPSS Superintendent, informed IBSS that GPSS
12 would issue a solicitation for copier services before the end of FY2005.⁶

13 6. Sometime between September 20, 2005 and November 18, 2005, Juan P. Flores,
14 GPSS Superintendent, informed Roland R. Franquez, IBSS' General Manager that GPSS
15 extended the expired DSA for a couple of months to allow FY2006 funds to be transferred to
16 GPSS. IBSS responded by requesting GPSS to disclose when it was planning to issue the copier
17 solicitation.⁷

18 7. On February 15, 2007, IBSS informed GPSS that, despite GPSS' failure to comply
19 with IBSS' repeated demands to provide a copy of the DSA or the bid documents for that
20 agreement, that IBSS knew that GPSS had not put the copier contract out for bid in many years.

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22 ² DSA No. 7002364, Page 1, GPSS Procurement Record, Tab 3.

23 ³ Amendment No. 1 to DSA, Page 1, GPSS Procurement Record, Tab 3.

24 ⁴ Amendment No. 17 to DSA, Page 1, GPSS Procurement Record, Tab 8.

25 ⁵ Letter from Roland Franquez, IBSS' General Manager, to Juan P. Flores GPSS Superintendent dated July 14,
26 2005, Attachment 1, to IBSS Notice of Appeal in OPA-PA-08-003.

27 ⁶ Letter from Roland R. Franquez, IBSS' General Manager, to Juan P. Flores GPSS Superintendent dated
28 September 20, 2005, Attachment 2 to IBSS' Notice of Appeal in OPA-PA-08-003.

⁷ Letter from Roland R. Franquez to Juan P. Flores dated November 18, 2008, Attachment 3 to IBSS' Notice of
Appeal in OPA-PA-08-003.

1 Specifically, IBSS learned that GPSS issued Purchase Order No. (PO) 200500350 in December
2 2004, which extended the DSA from October 1, 2004, to September 30, 2005. The PO was sole
3 sourced and GPSS issued PO 200601065 extending the DSA from January 1, 2006, through June
4 30, 2006.⁸ IBSS also made a formal demand that GPSS issue a solicitation for a new copier
5 contractor.⁹

6 8. On October 10, 2007, IBSS informed Claudia Acfalle, Chief Procurement Officer,
7 General Services Agency (GSA), that IBSS believed that procurement of the DSA may have
8 been organized through GSA through a Federal GSA Supply Schedule.¹⁰ IBSS also stated that it
9 had no knowledge how GPSS continued to procure copier services and products from Xerox
10 after June 30, 2006, due to GPSS's failure to respond to IBSS requests to review the DSA. In the
11 same letter, IBSS made a formal demand that GSA provide it GPSS' DSA procurement record,
12 based on the information received from GPSS that the DSA may have been organized through
13 GSA.¹¹

14 9. On October 15, 2007, GSA responded to IBSS' October 10, 2007, request to review
15 the DSA's procurement file by advising IBSS that GSA would forward IBSS' request to GPSS
16 legal counsel.¹²

17 10. After getting no response, IBSS sent GPSS' Legal Counsel a letter on October 26,
18 2007 requesting that GPSS respond to the concerns and requests IBSS raised in their October 10,
19 2007 letter to GSA.¹³

22 ⁸ Letter from John Thos. Brown, Esq., General counsel for Jones & Guerrero Co., Inc. (Guam, USA) to Luis S.N.
23 Reyes dated February 15, 2007, Attachment 4 to IBSS' Notice of Appeal in OPA-PA-08-003.

24 ⁹ Id.

25 ¹⁰ Letter from John Thos. Brown, Esq., General counsel for Jones & Guerrero Co., Inc. (Guam, USA) to Claudia S.
26 Acfalle, Chief Procurement Officer, GSA, dated October 10, 2007, Attachment 5 to IBSS' Notice of Appeal in
OPA-PA-08-003.

27 ¹¹ Id.

28 ¹² Letter from Anita T. Cruz, Assistant Chief Procurement Officer, GSA, to Kenneth T. Jones, President, Jones &
Guerrero Co., Inc., dated October 15, 2007, Attachment 6 to IBSS' Notice of Appeal in OPA-PA-08-003.

1 11. On or about December 4, 2007, IBSS filed a protest with GPSS alleging improper
2 procurement of copier machine products and related services by GPSS and requesting that
3 GPSS' award of the DSA to XEROX be terminated, and that the DSA be declared null and
4 void.¹⁴

5 12. On or about January 10, 2008, IBSS requested GPSS provide them a final decision
6 on their December 4, 2007 protest.¹⁵

7 13. On or about January 31, 2008, GPSS issued PO 200800507 to XEROX for the
8 amount of \$399,111 to cover various DSA costs for the period January 1, 2008 thru March 31,
9 2008.¹⁶

10 14. Approximately sixty-five (65) days after filing their protest, on or about February 7,
11 2008, IBSS filed their appeal in OPA-PA-08-003 stating that it was appealing GPSS' failure to
12 respond to IBSS' protest.¹⁷

13 15. On July 11, 2008, the Public Auditor decided OPA-PA-08-003 by finding she did
14 not have jurisdiction to hear the appeal due to GPSS' failure to issue a decision on IBSS' protest.
15 The Public Auditor held that GPSS' failure to decide the protest violated 5 G.C.A. §5425(c) and
16 (d) and 2 G.A.R., Div. 4, Chap. 9, §9101(g), and the failure to issue the decision was a bad faith
17 act that violated 5 G.C.A. §5003 because it undermined the integrity of the procurement process.
18 The Public Auditor also ordered GPSS' Superintendent to produce the decision no later than
19 seven (7) days after the decision date.
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22 ¹³ Letter from John Thos. Brown, Esq., General counsel for Jones & Guerrero Co., Inc. (Guam, USA) to Fred
23 Nishihira, Esq., GPSS Legal Counsel, dated October 26, 2007, Attachment 7 to IBSS' Notice of Appeal in OPA-PA-
24 08-003.

25 ¹⁴ IBSS Notice of Protest, Attachment 8 to IBSS' Notice of Appeal in OPA-PA-08-003.

26 ¹⁵ IBSS Request for Final Decision on Notice of Protest dated January 10, 2008, Attachment 9 to IBSS' Notice of
27 Appeal in OPA-PA-08-003.

28 ¹⁶ Purchase Order No. 200800507, GPSS Procurement Record, Tab 14.

¹⁷ IBSS' Notice of Appeal, Pages 1-2.

1 The fourteen (14) day protest period in Guam' Procurement Law controls this issue.
2 Guam Procurement Law, to include its Article 9 which governs the time period for filing
3 protests, applies to GPSS. 5 G.C.A. §5125. Whenever Guam procurement law applies to an
4 agency's procurement activities and such agency's procurement regulations conflict with Guam
5 procurement law, such agency's procurement activities must satisfy the requirements of Guam's
6 Procurement Law and not the conflicting agency procurement regulation. *Guam Imaging*
7 *Consultants, Inc., and RADS v. Guam Memorial Hospital Authority*, 2004 Guam 15, ¶41
8 (Supreme Court of Guam). Thus, the Hearing Officer recommends that the Public Auditor
9 resolve this conflict by finding that the fourteen (14) day period to file protests set forth in 5
10 G.C.A. §5425(a) controls the issue of whether IBSS' protest was timely. The next step in this
11 analysis is to determine when the fourteen (14) day protest period began to run.

12 **The Execution of the DSA on December 18, 2000 did not Trigger the Protest Period.**

13 The Hearing Officer recommends that the Public Auditor find that IBSS was not aware of
14 or could not be aware of the DSA until after it filed its protest. On July 14, 2005, as stated
15 above, IBSS knew that Xerox was providing copier services to GPSS and that this had been
16 occurring for a long period of time. On February 15, 2007, as stated above, IBSS knew that
17 GPSS had not bid out the copier contract in many years. On September 18, 2007, GPSS verbally
18 informed IBSS that the DSA was based on an agreement between GSA and Xerox that allowed
19 GPSS to by-pass the bid process and contract directly with Xerox.¹⁹ This information merely
20 indicates that GPSS was receiving copier services from Xerox without a competitive bid based
21 on an agreement between GSA and Xerox. The Hearing Officer recommends that the Public
22 Auditor find that this information does not constitute facts that would cause IBSS to know or
23 should know that the DSA was improperly procured.

24 **The Execution of DSA Amendment No. 17 did not Trigger the Protest Period.**

25 As a result of not having access to the procurement record prior to filing its protest, IBSS
26 did not know or could not know of the facts giving rise to its protest. The Hearing Officer
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¹⁹ Page 5, Notice of Appeal in OPA-PA-08-003.

1 recommends that the Public Auditor find that the execution of DSA Amendment No. 17 on
2 December 16, 2004 did not trigger the fourteen (14) day protest period for IBSS. GPSS denied
3 IBSS' protest solely on the ground that it was filed over three (3) years after GPSS executed
4 DSA Amendment No. 17.²⁰ The Public Auditor must determine what facts if any, IBSS knew or
5 should have known concerning the execution of DSA Amendment No. 17 because it extends the
6 DSA until December 31, 2009. This issue is resolved by determining the date IBSS had access
7 to the procurement record. Indeed, IBSS had an absolute right to inspect and make copies of the
8 DSA procurement record. With limited exceptions, GPSS procurement records are public
9 records. 5 G.C.A. §10102(d), §5249, and §5251, and Chapter III, §3.27.3 and §3.27.5, GPSS
10 Procurement Regulations. Further, public records are open to inspection at all times during the
11 office hours of the agency and every person has a right to inspect any public record. 5 G.C.A.
12 §10103(b). If GPSS treated the DSA procurement file as a public record, a count as to whether
13 there were more or less fourteen (14) days between the date IBSS inspected or received a copy of
14 the procurement file and the date they filed their protest could be determined.

15 The record shows that IBSS did not have access to the DSA procurement file until after
16 IBSS filed its appeal in OPA-PA-08-003 on February 7, 2008. IBSS received partial access to
17 the DSA's procurement file on February 20, 2008, and full access to it on February 22, 2008,
18 when GPSS filed its Procurement Record and Supplemental Procurement Record in OPA-PA-
19 08-003.²¹ This was over eighty (80) days after IBSS filed its protest on December 4, 2007.
20 GPSS was the sole cause of the delay because IBSS made two (2) requests to inspect the DSA
21 procurement file and GPSS did not respond to the requests. As stated above, IBSS' made its first
22 request on October 10, 2007. Although this request was sent to GSA, GSA routed the request to
23 GPSS' legal counsel. After receiving no response from GPSS, IBSS made a second request
24 directly to GPSS' legal counsel. IBSS filed their protest after GPSS did not respond to IBSS'
25 second request. The Hearing Officer recommends that the Public Auditor also find that GPSS,

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27 ²⁰ GPSS Protest Decision dated July 22, 2008, Attachment 1, Notice of Appeal.

28 ²¹ GPSS Procurement Record filed on February 20, 2008 and Supplemental Procurement Record filed on February
22, 2008 in OPA-PA-08-003.

1 through its inaction, denied IBSS its right to inspect and make copies of the DSA's procurement
2 file, which is a public record.

3 Thus, without access to the DSA procurement file, IBSS did not know of and could not
4 have known of DSA Amendment No. 17. Only after a protestor is afforded the opportunity to
5 review the procurement record can it fully develop its arguments with regard to alleged bidding
6 irregularities and statutory violations. *Goodwill Industries Guam, Inc., v. Guam Mass Transit,*
7 SP82-00, Page 5, Decision and Order dated March 20, 2000 (Superior Court of Guam). The
8 Hearing Officer recommends that the Public Auditor find that the December 16, 2004, date DSA
9 Amendment No. 17 was executed did not trigger the fourteen (14) day protest period for IBSS
10 because IBSS did not know and could not have known about the Amendment until after it
11 reviewed the DSA procurement file. However, the analysis does not end here. The record
12 indicates that IBSS knew of DSA purchase orders and GPSS officials made verbal statements to
13 IBSS concerning the DSA.

14 On another note, a further analysis of the record indicates that (1) GPSS officials made
15 verbal statements to IBSS concerning the DSA and (2) IBSS knew of DSA purchase orders. As
16 such, the Public Auditor must determine whether the purchase orders or the verbal statements
17 triggered the fourteen (14) day protest period.

18 **PO 200500350 and PO 200601065 did not Trigger the Protest Period.**

19 IBSS' knowledge of PO 200500350 and PO 200601065 did not trigger the fourteen (14)
20 day protest period. On February 15, 2007, as stated above, IBSS knew that GPSS issued PO
21 200500350 in December, 2004 which extended the DSA from October 1, 2004 to September 30,
22 2005, and that GPSS issued PO 200601065 extending the DSA from January 1, 2006 through
23 June 30, 2006. Normally, the Purchase Orders extending the DSA from October 1, 2004 to
24 September 30, 2005 and then extending the DSA from January 1, 2006 to June 30, 2006 would
25 constitute facts that IBSS could base a protest on. However, the record indicates that IBSS only
26 knew about them in February, 2007, well over six (6) months after the last extension had expired
27 on June 30, 2006. This is supported by IBSS' statement October 10, 2007, statement that it had
28 no knowledge how GPSS continued to procure copier services and products from Xerox after

1 June 30, 2006.²² Thus, the Hearing Officer recommends that the Public Auditor find that these
2 purchase orders do not constitute facts that would cause IBSS to know or should know of DSA
3 Amendment No. 17.

4 **GPSS' Verbal Statements did not Trigger the Protest Period.**

5 GPSS' statements were not credible and were insufficient to trigger the fourteen (14) day
6 protest period. As stated above, sometime in between September 20, 2005, and November, 18,
7 2005, Juan P. Flores, GPSS Superintendent, informed Roland R. Franquez, IBSS' General
8 Manager that GPSS extended the expired DSA for a couple of months to allow FY2006 funds to
9 be transferred to GPSS. IBSS also states that in a September 18, 2007, meeting they were
10 verbally informed by GPSS officials²³ that the current extension of the DSA commits GPSS until
11 September 30, 2009.²⁴ These verbal statements are not supported by the procurement record.
12 One of the underlying purposes and policies of Guam's Procurement Law is to ensure the fair
13 and equitable treatment of all persons who deal with the procurement system of the Government
14 of Guam. 5 G.C.A. §5001(b)(4) and Chapter I, §1.2.4, GPSS Procurement Regulations. Further,
15 all parties involved in the negotiation, performance, or administration of Government of Guam
16 contracts are required to act in good faith. 5 G.C.A. §5003. . Here based on the record, the
17 verbal information concerning the extensions given by GPSS Superintendent Juan P. Flores and
18 other GPSS officials were conflicting. The record indicates, as stated above, that Juan P. Flores,
19 GPSS superintendent, executed DSA Amendment No. 17 which extended the DSA to December
20 31, 2009. Yet, as stated above, seven (7) months later, Flores advised Roland Franquez that
21 GPSS would issue a solicitation for copier services before the end of 2005, and when this did not
22 occur, Flores told Franquez that they extended the DSA for a couple of months to allow GPSS to
23 receive FY2006 funds. The Hearing Officer recommends that the Public Auditor find that these

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26 ²² Letter from John Thos. Brown, Esq., to Claudia S. Acfalle dated October 10, 2007, Attachment 5 to IBSS' Notice
of Appeal in OPA-PA-08-003.

27 ²³ Ike Santos, GPSS Federal Programs Administrator, Acting GPSS Chief Financial Officer Frances Danieli, and
28 Acting Supply Management Administrator Roque Alcantara

²⁴ Id.

1 statements are misleading. The GPSS Superintendent's verbal representation that the contract
2 was extended until September 30, 2009, is also inaccurate considering the fact that Amendment
3 17 of the DSA clearly indicates that the DSA expires on December 31, 2009. The Hearing
4 Officer recommends that the Public Auditor find that these conflicting statements do not
5 constitute facts that would trigger the fourteen (14) day protest period.

6 Based on the foregoing, the Hearing Officer recommends that the Public Auditor find that
7 IBSS' December 4, 2007, protest was timely. The Public Auditor should address the merits of
8 IBSS' protest.

9 **B. GPSS' Sole Sourcing of the DSA to XEROX violated Guam Procurement Law.**

10 IBSS's first argument is that the DSA was improperly procured because there was no
11 competitive bidding process.²⁵ This analysis begins by determining how the DSA was procured.
12 In the September 18, 2007, meeting mentioned above IBSS was verbally informed by GPSS
13 Federal Programs Administrator Ike Santos that the DSA was riding on an agreement made
14 between GSA and Xerox which allowed GPSS to bypass the bid process and directly contract
15 with Xerox.²⁶ This is not supported by GPSS' record of the procurement. The procurement
16 record begins with Xerox Blanket Purchase Agreement No. 070036600 (BPA) and a letter dated
17 March 23, 1989, from the Chief Procurement Officer (CPO) to the Attorney General (AG)
18 requesting a legal opinion as to whether the CPO could sign the BPA because of the price breaks
19 being offered by Xerox. Further, an informational memorandum from the AG's Office dated
20 April 7, 1989, which expresses the belief that the CPO had the authority to sign the BPA and a
21 signed copy of the BPA referencing the memorandum are also to be considered here.²⁷ The link
22 between the BPA and the DSA is unclear. At the time the BPA was signed, GPSS was not part
23 of the centralized procurement regime governed by GSA and the CPO had no authority to
24 procure contracts for GPSS. 5 G.C.A. §5030(k), §5120, and §5125. Also, the BPA and the DSA

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26 ²⁵ Page 1, IBSS Protest, Attachment A, Agency Report.

27 ²⁶ Letter from John Thos. Brown, Esq., to Claudia S. Acfalle dated October 10, 2007, Attachment 5 to IBSS'
28 Notice of Appeal in OPA-PA-08-003.

²⁷ Tabs 1 and 2, Procurement Record.

1 are not the same or related contracts. Although they are both Xerox contracts, the BPA's No. is
2 070036600 and the BPA is between Xerox and GSA. In contrast, the DSA's No. is 7002364 and
3 its between Xerox and GPSS. Finally, the BPA expired on or about April 12, 1990 and the DSA
4 was executed over a decade later on December 18, 2000.²⁸ The Hearing Officer recommends
5 that the Public Auditor find that the BPA is not the solicitation or method of procurement for the
6 DSA.

7 The DSA is the result of a sole source procurement. PO 200100128, which is the
8 purchase order authorizing the initial \$1,518,557.56 in funding for the DSA, indicates that the
9 DSA was sole sourced due to the compatibility of equipment, accessories, or replacement parts.²⁹
10 Thus, the Hearing Officer recommends that the Public Auditor find that GPSS procured the DSA
11 via sole source procurement. The next step in the analysis is to determine whether the DSA was
12 properly procured under the laws and regulations governing GPSS sole source procurement.

13 Generally, a contract may be awarded for a supply, service, or construction item without
14 competition when the head of a purchasing agency or his designee above the level of
15 procurement officer and GPSS Supply Management Administrator determines in writing that
16 there is only one source for the required supply, service, or construction item. 5 G.C.A. §5214
17 and Chapter III, §3.12, GPSS Procurement Regulations. The determination as to whether a
18 procurement shall be made as a sole source shall be made by the GPSS Superintendent or the
19 designee of such officer. Chapter III, §3.12.2, GPSS Procurement Regulations.

20 **Guam Procurement Law Statutes governing Sole Sourcing Contracts Controls.**

21 The Public Auditor must once against resolve a conflict between Guam Procurement Law
22 and GPSS Procurement Regulations. Specifically, Guam Procurement Law mandates that only
23 the head of a purchasing agency or his designee above the level of procurement officer can make
24 a written determination that there is only one source for the required supply, service, or
25 construction item. 5 G.C.A. §5214. The term "procurement officer" is defined as any person
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27 ²⁸ BPA, Paragraph 5, Page 1, Tab 2, and DSA, Tab 3, Procurement Record.

28 ²⁹ Page 2, PO 200100128, Tab 3, Procurement Record.

1 duly authorized to enter into and administer contracts and make written determinations with
2 respect thereto. 5 G.C.A. §5030(p). In contrast, GPSS' Procurement Regulations do authorize
3 GPSS' Supply Management Administrator, who is GPSS' main procurement officer, to make the
4 same determination.³⁰ As stated above, when there is a conflict between Guam Procurement
5 Law and Agency Procurement Regulations Guam Procurement Law controls. *Guam Imaging*
6 *Consultants, Inc., and RADS v. Guam Memorial Hospital Authority*, 2004 Guam 15, ¶41
7 (Supreme Court of Guam). The Hearing Officer recommends that the Public Auditor resolve
8 this conflict by finding that only the GPSS Superintendent or his designee above the level of
9 procurement officer can make a written determination that there is only one source for the
10 required supply, service, or construction item.

11 The written determination made by GPSS' Supply Management Administrator violates
12 Guam's Procurement Law. As stated above, only the GPSS Superintendent or his designee
13 above the level of procurement officer can make a written determination that that there is only
14 one source for the required supply, service, or construction item. Here, the only written
15 determination that the copier services, supplies, and equipment covered by the DSA could come
16 from XEROX was made by Juan M. Pangelinan, then GPSS' Supply Management
17 Administrator.³¹ Thus, the DSA was improperly sole sourced because the written determination
18 justifying the sole source was made by a procurement officer, and not by GPSS' Superintendent
19 or designee above the level of procurement officer.

20 Further, there is no evidence that GPSS could procure the copying services or equipment
21 from other vendors such as IBSS. Sole source procurement is not permissible unless a
22 requirement is available from only a single supplier and a requirement for a particular proprietary
23 item does not justify sole source procurement if there is more than one potential bidder or offeror
24 for that item. Chapter III, §3.12.2, GPSS Procurement Regulations. Circumstances which could
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27 ³⁰ Although Chapter 3, §3.12 states that the written determination for sole source procurement must be made by the
28 GPSS Superintendent or her designee above the level of Supply Management Administrator, §3.12.2 does not
specify the rank of the Superintendent's designee. This internal conflict is resolved in favor of §3.12 by the above
analysis because Guam procurement law requires the designee to be above the level of procurement officer.

³¹ Page 2, PO200100128, Tab 3, Procurement Record.

1 necessitate sole source procurement include situations in which the compatibility of equipment,
2 accessories, or replacement parts is of paramount consideration. Chapter III, §3.12.2.1, GPSS
3 Procurement Regulations. Here, the fact that XEROX provides copying services and equipment
4 does not justify a sole source procurement determination because XEROX is not the only
5 possible source of copier services and equipment.

6 The fact that XEROX copiers, equipment, and software is proprietary, does not justify a
7 sole source procurement determination because other brands of equivalent copiers, equipment,
8 and software are available and if GPSS intended to limit its copying services, equipment, and
9 software to the XEROX brand, such intent violates Guam Procurement Law and GPSS
10 Procurement Regulations. All specifications shall seek to promote overall economy for the
11 purposes intended and encourage competition in satisfying the Government of Guam's needs and
12 shall not be unduly restrictive. 5 G.C.A. §5265 and Chapter IV, §4.6, GPSS Procurement
13 Regulations. Further, all specifications shall be written in such a manner as to describe the
14 requirements to be met, without having the effect of exclusively requiring a proprietary supply,
15 service, or construction item, or procurement from a single source, unless no other manner of
16 description will suffice, and in that event, a written determination shall be made that it is not
17 practicable to use a less restrictive specification. Chapter IV, §4.6.1. Here, there is no evidence
18 in the procurement record that GPSS made a written determination that it was not practicable to
19 use any brand of copier services, equipment, or software other than the XEROX brand. Thus,
20 the XEROX brand specification does not justify a sole source procurement determination
21 because limiting GPSS' copier services, equipment, and software to the XEROX brand would be
22 an unduly restrictive specification.

23 **C. The DSA was improperly extended.**

24 IBSS' second argument is that the DSA was improperly renewed.³² As stated above, the
25 DSA's original term expired on December 31, 2005 and GPSS extended the DSA until
26 December 31, 2009 by executing DSA amendment No. 17 on December 16, 2004. Generally, a
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³² Page 3, IBSS' Protest, Attachment A, Agency Report.

1 contract for supplies or services may be entered into for any period of time deemed to be in the
2 best interests of the Government of Guam provided the term of the contract and conditions of
3 renewal or extension, if any, are included in the solicitation and funds are available for the first
4 fiscal period at the time of contracting. 5 G.C.A. §5237(a). However, prior to using a multi-year
5 contract, it must be determined in writing that such contract will serve the best interest of the
6 Government of Guam by encouraging effective competition or otherwise promoting economies
7 in government procurement. 5 G.C.A. §5237(b)(2). There is no such written determination in
8 the procurement record nor can such a determination be made in this case. Here, as stated above,
9 other vendors of copier services, equipment, and software were excluded from the procurement
10 process because the DSA was improperly sole sourced. DSA Amendment No. 17 continued this
11 improper exclusion of competition from the procurement process by extending the DSA for
12 another five (5) year period. Thus, the Hearing Officer recommends that the Public Auditor find
13 that DSA Amendment No. 17 improperly renewed the DSA because the five (5) year renewal
14 period continued the improper exclusion of other vendors for copier services, equipment, and
15 software.

16 **D. The DSA and DSA Amendment No. 17 are void.**

17 The Hearing Officer recommends that the Public Auditor find that the award of the DSA
18 to XEROX is void. If after an award it is determined that a solicitation or award of a contract is
19 in violation of law, and the person awarded the contract has not acted fraudulently or in bad
20 faith, the contract may be: (1) Ratified or affirmed if doing so is in the best interests of Guam; or
21 (2) The contract may be terminated and the person awarded the contract shall be compensated
22 for the actual expenses reasonably incurred under the contract plus a reasonable profit, prior to
23 the termination. 5 G.C.A. §5452(a)(1). Here, as set forth above, it is recommended that the
24 Public Auditor find that the DSA was not properly sole sourced and improperly extended to
25 December 31, 2009. Further, the Hearing Officer recommends that the Public Auditor find that
26 there is nothing in the record indicating XEROX acted fraudulently or in bad faith in procuring
27 the DSA or DSA Amendment No. 17. The Hearing Officer recommends that the Public Auditor
28 find that ratifying or affirming the DSA is not in the best interests of the Government because

1 GPSS' improper sole sourcing and renewal of the DSA, and GPSS' conflicting comments to
2 IBSS are not in line with the integrity of the procurement process as IBSS was not given a level
3 playing field to compete for a contract as other prospective bidders. The Hearing Officer
4 recommends that the Public Auditor find that the DSA shall be terminated as of the date of this
5 Decision, and XEROX shall be compensated for the actual expenses it reasonably incurred under
6 the contract plus a reasonable profit, which the Hearing Officer recommends that the Public
7 Auditor find to be the GPSS monthly payments set forth in the DSA, as amended, prior to and up
8 to the termination date.

9 IV. CONCLUSION

10 Based on the foregoing, the Hearing Officer recommends that the Public Auditor
11 determine the following:

12 1. GPSS, through its inaction, improperly denied IBSS its right to inspect and copy the
13 DSA procurement file in violation of 5 G.C.A. §10102(d) §10103(b), §5249, and §5251, and
14 Chapter III, §3.27.3 and §3.27.5, GPSS Procurement Regulations.

15 2. GPSS' failure to inform IBSS of DSA Amendment No. 17 extension of the DSA until
16 December 31, 2009, and GPSS' statements to IBSS that GPSS would put out a bid for copier
17 services in 2005, and/or 2006, were misleading as GPSS did not put out new bids for copier
18 services. GPSS' failure to put out the bids undermines the integrity of the procurement process
19 and is a bad faith act that violates 5 G.C.A. §5003.

20 3. IBSS' December 4, 2007 Protest was timely.

21 4. GPSS improperly sole sourced the DSA to XEROX in violation of 5 G.C.A. §5214,
22 and Chapter III, §3.12.2, GPSS Procurement Regulations.

23 5. GPSS improperly extended the DSA to December 31, 2009 by executing DSA
24 Amendment No. 17 in violation of 5 G.C.A. §5237(b)(2).

25 6. IBSS appeal is sustained.

26 7. The DSA, as amended, is hereby terminated as of the date of this decision and
27 XEROX shall be compensated for the actual expenses it reasonably incurred under the DSA plus
28 a reasonable profit, prior to the termination.

1 A copy of this Finding of Hearing Officer shall be provided to the parties and their
2 respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review
3 on the OPA Website www.guamopa.org.

4 **DATED** this 28th day of November, 2008.

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7 ANTHONY R. CAMACHO, ESQ.
8 Hearing Officer
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